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PAPER VICTORY

The United States v. the New York Times and the Washington Post

by Charles Rembar

How do you read the First Amendment?

This summer solstice we knelt before the Doctrine of Prior Restraint and rose amid hosannas. The New York *Times* and the Washington *Post* (hereinafter called "the papers") had begun to publish the Pentagon Papers (hereinafter called "the Papers"). The Government went to court to enjoin the publication. Do not grant the injunction, the papers urged, because the heavenly prohibition in our Constitution is that there shall be no prior restraint. The judges agreed, more or less, but adequately more; the printing of the Papers was allowed to go ahead. A great legal victory was won, we were told, a great constitutional victory. Applause cards were lifted all around.

There were some, however, who did not cheer. The President and his Attorney General seemed downright grumpy. One maintained a sulky silence; the other threatened to put some people in jail. But a losing law firm is never cheerful, even when, as in this instance, it has had considerable experience in losing.

Nixon & Mitchell brought a case they had to lose. There might have been differences over whether a temporary stay should have been granted, and for how long it should have remained in force. But there was no chance that the government could have won what it was after—a permanent injunction. Even the dissenters stopped short of saying the Pentagon Papers should not have been published. They objected, mainly, to being pressed to respond so fast.

There was no occasion for the hurrahs at the decision. There was occasion for remorse. The publication was certainly important; the judicial victory was not. The legal arguments that the newspapers made were paltry. The Justices' opinions were too narrow and too broad, and in thought and writing far below the usual level of Supreme Court opinions. A great chance was fumbled. Nixon & Mitchell did their part. The opposition failed. So did the Supreme Court. The judges below acted well. A remarkably good performance was given by the very first to whom the matter was presented, Judge Murray Gurfein of the New York District Court. (It was all the more remarkable because he was a newborn judge. He was sworn in on Thursday, ascended the bench the following Monday, and on Tuesday heard the government demand that he enjoin the New York *Times*.) But these were cases plainly destined for the highest Court, and it was there that the decision would be made and the opinions handed down that could have so great an effect on the future of our freedoms.

Not that the decision itself—the final disposition of the case—was wrong. It was utterly right. The government's suit for injunction should have been dismissed, and was. No unexcited lawyer with a knowledge of the First Amendment should have expected any other outcome. But opinions in Supreme Court cases, as well as the decisions, have immense significance. Here our Justices failed us.

It might have been the rush. If the Justices had had another week to work, there would have been, in all likelihood, a worthier set of opinions. But the dissenters, denouncing the speed the majority forced upon them, were not asking for another week to think about the matter. They were referring to the entire litigation, from the District Courts on up. As Mr. Justice Blackmun put it, the cases should have

been remanded, to resume ". . . on a schedule permitting the orderly presentation of evidence from both sides, with the use of discovery if necessary. . . ." "Discovery" embraces a set of procedures by which each litigant investigates the other—has documents produced, examines witnesses under oath, goes to court for rulings when objections are made—in effect, has a pretrial trial. Then comes the trial itself. Then you wait for a decision. Then you have appeals. No matter how "expeditious" the handling of the matter, the dissenters' prescription could use up months, and the First Amendment does not contemplate that free expression should slowly choke on legal process.

Nor was there any need for what the dissenters were demanding. It is a hard thing to say—especially of a judge as able as John Harlan—but the dissenters overlooked a fundamental aspect of our law. It is simply this: the plaintiff must make his case. We—the Americans and the English—use an adversary system. There are different legal systems elsewhere, under which the judges are inquisitors who investigate and find the facts themselves. Our method depends instead on the thrash and wrangle of the litigating parties. Trial by combat has never ended. The plaintiff must show the court what he complains about. The defendant must show that what the plaintiff says is false, or, if true, that it does not matter. The court has a comparatively passive role. Some of the Justices complained that the Pentagon Papers filled forty-seven volumes. But there was no need to take the time to read all forty-seven volumes. The government occupies no privileged position, under our law, when it comes to court. It must, like any other plaintiff, make its case. Both trial judges gave the government ample opportunity to do this. When it finished pointing out, specifically, those parts of the Pentagon Papers that were likely to do damage, the record was complete.

Nor should the government have been heard to say that the short notice would not permit it to make its case. It was not dealing with strange material; these were its own documents. Could the government find no one in its employ who had studied them? If they were of so little interest that no such person could be found, that fact in itself should have ended the case. But actually the government had been reviewing the Pentagon Papers since Senator J. William Fulbright, a year and a half before, had asked for a look at them. (What is called "the United States" or "the government" in these cases is not, of course, the nation, or even the entire government; it is merely the Executive, one branch of three.)

A major defect in the Justices' opinions was the talk about the possible criminal liability of the newspapers. Since the function of our courts is to decide the cases put before them, judges are properly laconic. It is not that they must write short opinions; it is rather that their opinions, generally, should be addressed to the litigated questions. They frequently remind us that they do not rule on matters not in issue. Mr. Justice White, unaccountably, came close to doing exactly that. Moreover, Mr. Justice Stewart joined in White's opinion; Chief Justice Burger said he was "in general agreement" with what White said "with respect to penal sanctions"; Mr. Justice Blackmun said he was "in substantial accord with much that Mr. Justice White says, by way of admonition"; and Mr. Justice Marshall devoted part of his opinion to "whether a good-faith prosecution could have been instituted."

The greater part of Mr. Justice White's opinion was addressed to the matter of whether the newspapers had committed crimes. No facts were presented on the issue of whether a crime was committed; no legal arguments were made. It would have been legitimate, as part of a judge's reasoning, to say that while he felt no injunction should be granted, this did not mean that there was no violation of a statute. But Mr. Justice White went further. If he did not explicitly invite the Department of Justice to prosecute the newspapers, he at least supplied a number of helpful hints on how to argue in support of such a prosecution. Assuming the newspapermen are indicted, there is a question whether any person who reads this opinion can properly serve as a juror.[1]

Another weakness is that several of the Justices—on both sides of their division—wrote opinions on power rather than on the First Amendment. The Constitution deals with governmental power in two ways: it confers it, and it puts restrictions on its exercise. The Constitution as originally drafted dealt mostly with the grant of power—to Congress, to the Executive, to the Judiciary. The Bill of Rights, on which the states insisted before they would approve the Constitution, contains most of the restrictions. Accordingly, an act of Congress or an order of the President, brought under constitutional scrutiny, must pass two tests: does the power exist, and has it been exercised in such a way as to violate some prohibition? The existence of the power does not tell us whether its exercise is lawful.

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[1] The opinion concludes with a disclaimer: "I am not, of course, saying that either of these newspapers has yet committed a crime or that either would commit a crime if they published all the material now in their possession."

But one may wonder at the effect of such a disclaimer when it comes at the end of a long discussion of criminal liability, a discussion containing such remarks as: "However. these same members of Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed."

Or, again: "If any of the material here at issue is of this nature, the newspapers are presumably now on full notice of the position of the United States and must face the consequences if they publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint."

Nevertheless, two of the Justices, Harlan and Marshall, gave the Bill of Rights only a very curt nod and then became engrossed in power questions. They came out with different answers. Mr. Justice Marshall, concurring in the majority decision, found that Congress had "specifically refused to give the Executive authority to ask, or the Court authority to grant, the injunction that was sought." Mr. Justice Harlan, dissenting, found that the Executive had the power to prevent the publication, subject only to the Court's satisfying itself that the matter lay "within the proper compass of the President's foreign relations power," and that there had been a determination by "the Secretary of State or the Secretary of Defense—after actual personal consideration by that officer" that disclosure would irreparably impair the national security.

So Harlan would issue the injunction and Marshall would deny it, but the two opinions have much in common, principally a demeaning of the First Amendment. Marshall was not the only Justice to spend a lot of time on what Congress had or had not done. But where expression is constitutionally protected, no amount of legislative effort can change the situation. The First Amendment says that *"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."* If enjoining the publication of the Pentagon Papers is an abridgement, the fact that Congress has made just such a law means only that the law is void.

If, on the other hand, the Amendment does not bar the way, the Executive branch of the government would seem entitled to the injunction. If it has lawful power to keep some things confidential, why can't it ask the courts for help? Any private person can. No statute is necessary to prompt a court to issue an injunction where some right of property needs protection; it is part of the ancient jurisdiction of the courts of chancery, a jurisdiction inherited by contemporary federal courts. Businessmen go to court to get decrees against disclosure of trade secrets. Landowners get injunctions against obtrusive acts of neighbors. The Executive, concerned for the safety of all the people, should have no less standing in our courts than a plaintiff complaining that his real estate will fall in value. The preoccupation with statutes (by both Court and counsel) seems to have been unfocused.

Yet, granted the Executive has power to obtain a decree of court in a proper case, the question remains whether under the First Amendment this was a proper case. It is not conceivable that we can be silenced, where Congress could not silence us, by the Secretary of State or by the Secretary of Defense, or by the President himself.

But the principal defect of the opinions was their concentration on prior restraint. And here the Justices may be excused, because it was that hollow legalistic doctrine on which (with "power" arguments) the papers made their stand. Altogether, the quality of the litigants' argument was less than it should have been. The presentation of a case, even to a court as independent and capable as the Supreme Court, has an effect not only on the outcome but on the opinions the judges write. It has an effect greater than is generally acknowledged, greater, probably, than the judges themselves may realize. Solicitor General Erwin Griswold—distinguished lawyer, distinguished legal scholar, former dean of Harvard Law School—began his argument with a discussion of copyright law. The First Amendment is not absolute, Griswold said; it must admit of some exceptions. But the illustration in no way proved his point. Copyright does not keep information from the public. There are two kinds of copyright, one granted by Act of Congress, the other by the common law. Statutory copyright keeps nothing secret. On the contrary, it requires publication; it is only publication, with appropriate notice, that gives the right at all. Common-law copyright, in contrast, lasts until there is a publication; the courts will shield an author who does not want his work to see the light of day. But it shields authors, not governments. Moreover, both kinds of copyright apply only to the art of the expression, to the form and not its substance. There is no information—no fact, idea, opinion, sentiment—that the law of copyright restricts. It supplies no precedent, no analogy, no instructive illustration that bears upon the case.

The weakness of Griswold's opening is symptomatic of the weakness of his argument throughout. One more example: reducing broader claims made by other government attorneys, he said the case came down to "ten specific items." But one of the items he "specified" consisted of four volumes. This may some day come to be a joke for after-dinner speeches, and in time will be discounted as apocryphal.

The most plausible explanation is that Griswold had no heart for the case he had to argue. If that is so, he should not have handled it. He should have turned it over to his boss, the Attorney General, who could have handled it with enthusiasm. Better still, Griswold might have resigned.

But it was the lawyers on the other side, with their clients, who had the job of defending freedom of the press. (It was not a matter of acting for a client who merely wanted to win his case; the clients here publicly assigned themselves a larger role.) The defense lawyers' arguments were narrow and timid, in manner and in scope. Take one example. Mr. Justice Stewart, excellent in the questioning of counsel, put a tough question:

> Let us assume that when the members of the court go back and open up this sealed record we find something there that absolutely convinces us that its disclosure would result in the sentencing to death of a hundred young men whose only offense had been that they were 19 years old and had low draft numbers. What should we do?

William Glendon, for the Washington *Post,* who argued last, had the benefit of hearing the question put to Alexander Bickel, for the New York *Times,* who preceded him. Glendon answered, in effect, that the hypothetical case was not the case before the court. This is a sound beginning, but it is not a sufficient answer. To support it, one must show the difference between the question posed and the case before the court. But even that is not enough; if the hypothetical question is not too far removed, and this one was not, it also deserves an answer of its own. Glendon did not undertake a direct answer, and Stewart did not press him, perhaps because there was a diversion; at this moment the Chief Justice came in with another question.

Professor Bickel was less fortunate. He could not avoid the question. After some colloquy he said:

> No, I am afraid that my inclinations to humanity overcome the somewhat more abstract devotion to the First Amendment in a case of that sort.

Sentimentality has never had a finer moment, at least not in the Supreme Court.

First, counsel might have asked the Justice to put his question into context. (Stewart, indeed, in his subsequent comments, suggested this himself.) It is tragic indeed that a hundred young men might die. It is more tragic still that thousands have died and many more have lost arms and legs and eyes, and that a country has been ravaged. Whether any man must die—young or old, drafted or enlisted, in war or for other reasons—is terribly important, but Stewart's question must be considered not in some other situation or some other world, but in this situation, in this world. There is destruction in Southeast Asia; these hundred deaths would be part of that destruction. The publication of the Pentagon Papers might bring an earlier end to the destruction; these hundred deaths might save a thousand lives. Or the publication might have an opposite effect. No one knows. We do not abandon freedom of speech—for which many men have died—on a supposition.

This brings us to the second answer to the question. We are dealing with a rule of law, laid down by the First Amendment. Any rule of law must cover a multitude of situations; otherwise it is no rule. The word "law" implies abstraction and generalization, in government as well as science. If each concrete dispute is to be decided on its own, without regard to any other, we have no law; rights and duties then have little content; no one knows just where he stands. We must generalize to create a rule of law.

But once we have a rule of law, we must accept that there are situations in which the general prescription works harshly, in some quite badly. The First Amendment is an abstraction. It carries with it suffering and peril. Some speech, some writing, will divert minds from the truth, will lead to bad behavior, will create injustice, will destroy. The theory of our system of free expression is that these are risks worth taking.

Thus the Supreme Court has, in certain situations, abolished the protection that the libel law had given, because the First Amendment demands the fullest liberty to speak on public issues, even where the plaintiff's reputation may be—by falsehood now protected—altogether ruined. The Court has also told us that the Amendment reduces antiobscenity laws severely (in the case of writing, to negligibility), though for many people the world would be a pleasanter place if things that now assail their senses were not thrust upon them. The Amendment safeguards the seductive utterance of heretical opinion, though millions believe that souls thereby are doomed to everlasting torment. And it protects the spread of false and cruel ideas. The American Nazis are permitted to speak their piece. Father Coughlin was not hindered by the courts. A vigorous advocate of return to black slavery would not be silenced.

We allow all this—indeed, shelter it—because our Bill of Rights embodies the decision that it is better to run these risks, to suffer these injuries, than to allow the government to determine what one should say, what one should write, what the public should hear and read. The majority is not permitted to silence the minority, no matter how convinced of rectitude the majority may be. There is greater danger in suppression, the axiom embodied in the First Amendment proclaims, than in the publication of what some of us, or most of us, or even almost all of us, believe to be dangerous or horrid. An argument the other way can be made. But this is our system; this is our law. Mr. Justice Stewart put the legal question; this should have been the lawyer's answer.

It is true, of course, that not every utterance is protected by the First Amendment's guarantee of free speech and freedom of the press. Congress certainly can, and has, made laws abridging the con man's freedom of speech; they are called the Securities Acts. No stock swindler has ever successfully urged the First Amendment. There is still a private law of libel. Cigarette companies have no constitutional right to sell their goods in packs that bear the legend "Tar and Nicotine Are Good For You." If one person persuades another to commit an ordinary crime, the instigator's speech itself amounts to crime. Espionage, which all agree is not protected by the Bill of Rights, is conducted by talking or by writing; there is a valid conceptual distinction between clandestine communication and public statement.

These things are not really exceptions. They can be accounted for semantically, simply by not inflating the words "speech" and "press" to their utmost literal capacity. Words should not be taken out of context, and the context here is the Bill of Rights.

But then there are some utterances which the First Amendment does not shield, and which cannot be accounted for this way. Assume, for example, that we are at war and a newspaper lets the enemy know that

we have broken their secret code. This is public statement; this is unquestionably "the press." Here the language of the First Amendment will not help us. We must simply recognize that there are exceptions. There is, and should be, some expression that the law can move against. But given the broad, plain words of the guarantee, and the need for free expression in a political system such as ours, the exceptions must be rare and narrowly limited.[1]

All the Justices accepted, expressly or by implication, the proposition that exceptions should be rare and narrow (apart from the two who would permit no exceptions at all). And a majority (a majority at least; it appears that even the dissenters might have gone along if the procedure had satisfied them, if matters had not been so rushed) agreed that the case against the publication of the Pentagon Papers did not qualify as an exception.

That exceptions to the First Amendment should be rare and narrow is a valid rule. The decision to deny the injunctions sought was a sound application of the rule. The Court, however, put both the rule and its application not in terms of First Amendment freedoms generally but in terms of prior restraint. This is the ultimate failure of these cases. The decision should have said: the press is free to publish the Pentagon Papers. Instead it said a lesser thing: the press is free from suit for an injunction. And, most of the Justices added, the publishers had better watch their step; they may very well go to jail after they exercise their freedom.

Every Justice spoke in terms of prior restraint. All the cases cited in the *per curiam* opinion are cases of prior restraint. Everyone agreed that prior restraint has a special place—the Justices, even the most libertarian; the lawyers in their arguments; the newspapers themselves in their statements about the case; the commentators.

Here it is necessary to speak slowly, since there is such massing of opinion going the other way. Let us go back in history. In sixteenth- and seventeenth-century England, the government controlled the presses. Printing was a licensed business. If a printer tried to act without a license, his press would be seized and what he printed confiscated. (He could also be prosecuted for his crime.) In 1694 the licensing statute was permitted to expire. In part, the end of licensing was a product of the Glorious Revolution of 1688. Immediately, however, it seems to have been the result of administrative problems; licensing was becoming difficult to enforce. But criminal prosecution for speech or writing offensive to the government continued. Seditious utterance and heretical utterance had always been criminally punishable; early in the eighteenth century, obscene utterance was added to the list of common law crimes.

The doctrine of prior restraint—more accurately, the doctrine of no prior restraint—now came to full flower. It reached its most quoted statement in William Blackstone's *Commentaries on the Laws of England.* Blackstone has had a tremendous, and unfortunate, influence on our law. He was in fact an unsuccessful practitioner who shrewdly turned to teaching law; his lectures became the famous *Commentaries.* Twentieth-century scholars have demonstrated the fatuity of much of what he wrote, but his doctrine of prior restraint has somehow escaped the demolition. The core of his statement (with his italics) is this:

> The *liberty of the press* is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.

I suggest that the distinction is not good, in early times or now.

In early times, prior restraint was a more certain method, and subsequent punishment a more fearful deterrent, than either is today. The prior restraint was utterly effective (at least regarding future publication) because the printer lost his press. A subsequent punishment for seditious utterance could be, and on occasion was, the same as that for treason: the convicted man was hanged, cut down before he died, castrated, compelled to witness the burning of his severed parts, then drawn and quartered.

Even if the government should prevent an idea from being printed, that idea can nevertheless arise again in the mind of another person, who may then undertake to express it. If a populace is thoroughly cowed, however, thought itself is stunted. People fear to have new thoughts because if they have them they may utter them, and if they utter them dread consequences will follow. Both kinds of suppression are evil, but it is hard to say which one is worse.

Move to modern times, and think of it from the other side. You are a fledgling dictator, still not sure of absolute power, and faced with the problem of obliterating opposition. Is it better to control everything that is printed? The ideas may not disappear. Or is it better to allow a few opponents to publish their op-

[1] Justices Black and Douglas (rightly honored for other things) urged a literal approach, the so-called "absolute" theory of the First Amendment. There is not space to discuss it fully here, but two points may be made, one an appeal to reason, the other to authority. Both Justices subscribed to the settled principle that the First Amendment's guarantees apply to the states as well as to the federal government, though the words of the First Amendment mention only Congress. This is done by putting extra meaning into the Fourteenth Amendment, which does refer to the states rather than the federal government, but says nothing about speech or press. Thus Black and Douglas were able to maintain their position by making a thoroughly free translation of one amendment while insisting on a thoroughly literal reading of another. The authority is Justice Holmes, admired by both Black and Douglas. Holmes said, "A word is not a crystal, transparent and unchanged; it is the skin of a living thought."

position, and then make them face a firing squad? Which is more likely to teach the citizens a lesson?

Both prior restraint and subsequent punishment are, in the present time and in this country, different from what they were. Subsequent punishment is a prison sentence rather than the torture and death it used to be, though prison is for most people itself a torture. Prior restraint, however, has become altogether different. Consider what the government asked in these cases: injunction against further publication. An injunction is an order of the court that one must stop what one is doing, else go to jail. The distinctions between prior restraint and subsequent punishment now are only two: where there is subsequent punishment, a publisher does not know for sure, until the matter is decided, that he will go to jail; an injunction puts him on notice. Then there is the boon of a jury trial in a criminal case. It is a dubious boon. What the First Amendment ordinarily protects is minority opinion, and the jury is likely to represent the popular view. The specific idea we fear or hate is very real to us, while the theory that everybody ought to be free to say or write whatever he chooses is experienced as no more than that: a theory. For most people, freedom of expression means simply freedom for me. Judges, familiar with the importance of abstractions, are more likely than jurors to be willing to act on theory, and to allow hateful words their freedom.

So whether prior restraint or a subsequent punishment has the more baleful effect is a question that can be argued. But on neither side are the arguments so conclusive that we ought to cut the First Amendment in half, and give freedom of the press one meaning or another depending on the legal procedure the government decides to use.

Take the present case. It seems fairly clear that threat of criminal prosecution had its effect upon the papers. When the decision was handed down and the restraining order lifted, the series came to a quick, flat halt. The subsequent installments were brief and not startling. The possibility of criminal proceedings—subsequent punishment as distinguished from prior restraint—may be supposed to have worked.

There has been historical argument that prior restraint is what the First Amendment is all, or nearly all, about. It is true that most of the people who, in the eighteenth century, wrote about freedom of speech and press shared the Blackstone view. But appeals to such precedent overlook the fact that the American Revolution was just that—a revolution. Our Constitution is the legal expression of a rebellion.

Moreover, we do not know what all the people who voted for the Bill of Rights may have had in mind. The fact is they adopted a sweeping guarantee. "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." The Constitution is a statute, our fundamental statute. An elementary principle in interpreting a statute is that one need not go beyond its words where the words are plain enough. Here the words, in this regard, could not be plainer: they do not suggest, in any way, that exceptions are to be broader or more numerous where the procedure of suppression is criminal punishment rather than injunction. "Abridge" does not mean blot out. It means curtail, impair. The meaning was no different in the eighteenth century. Whatever "freedom of the press" may include—and it is here that the question of exceptions enters--there is no doubt about the sort of interference that the First Amendment contemplates. It contemplates any diminution of the freedom. Total suppression of a book is not the only thing that violates the guarantee; forcing the author to cut a paragraph is abridgement, too. And abridgement can be effected by different kinds of legal process. It makes no sense to assert that imprisonment for having published does not abridge the freedom of the press.

Finally, as John Marshall in 1819 said, ". . . it is a Constitution we are expounding." What he meant was that this was not an ordinary statute, but the structure of a government, the government of a nation that was expected to grow and change. This strikes with special force where the First Amendment is concerned. The Amendment had very little attention from the Court for a century and a half. The opinions that give it content start with cases following World War I, and the cases go steadily in the direction of greater freedom. (At least till now.)

It is undisputed history that the Bill of Rights was meant to protect the governed from their governors. If this intent is to be given effect, then as the power of the governors grows, the restrictions put upon them by the Bill of Rights must grow commensurately. Our present government is much more powerful than the government of 1791; it has great weapons at its disposal, not merely weapons of law enforcement but weapons designed to influence our minds. If the government's power, through its own speech and press, has gotten stronger, then the people's countervailing weapons must be made stronger. Otherwise the balance is upset. We do not allow the people's power to keep its intended level of strength when our main concern is that there shall be no prior restraint. On the contrary, we divert our energies; we fool ourselves that we are enlarging freedom when we do no more than pay allegiance to an atavistic concept.

Yet there is occasion for some thanksgiving—not a hurrah for victory but a sober commemoration. We can be sorry that the litigation was not better fought and did not give us judicial opinion that would better serve our future. But we can note that there was a litigation, and that the specific decision—that the newspapers should be allowed to publish, without any great delay—was never much in doubt. The government did not send soldiers to seize the presses or to confiscate the papers. Instead it went to court. □